Supreme Court, U.S.
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No. 96-106

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

DAVID S. HESS, MOTORCITY OF JACKSONVILLE, LTD., and MOTORCITY OF JACKSONVILLE, INC.,
Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR SOUTHEAST BANK, N.A., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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SUPPLEMENTAL BRIEF OF PETITIONERS

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November 5, 1996

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Pursuant to Rule 15.8 of this Court, petitioners file this supplemental brief to address "intervening matter not available at the time of" petitioners' reply brief. At the oral argument before this Court on November 4, 1996, in *Atherton* v. *FDIC*, No. 95-928, the FDIC's *primary* argument in favor of a federal common law rule for *pre*-FIRREA conduct by a director of a thrift was based on the need for consistency with the FDIC's interpretation of statutory provisions *enacted in FIRREA*—12 U.S.C. § 1818(e) and § 1818(i). See also Pet. Reply Br. at 5-7 nn.5-7 (discussing FDIC's written arguments in *Atherton*). By its litigating position in *Atherton*, the FDIC has thus effectively conceded that it is wrong to address the availability to a post-FIRREA receiver of a federal common law rule for pre-FIRREA conduct or post-FIRREA conduct without considering whether the federal common law rule is consistent with Congress' policy judgments expressed in FIRREA. The FDIC's position in *Atherton* makes plain that its last-minute "retroactivity" argument offered in this case, which similarly involves a post-FIRREA receiver and pre-FIRREA conduct, is purely a makeweight designed solely to defeat certiorari in a case raising an acknowledged circuit conflict that warrants review by this Court.

Respectfully submitted,

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